LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.
FILED
NOV 28 197
MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1973
No. 73-721

MINDY MEYERS, an Infant, by Her Parent and Natural Guardian, MARVIN MEYERS, and MARVIN MEYERS, Individually, and LYNDA BIENENFELD, an Infant, by Her Parent and Natural Guardian, STANLEY BIENENFELD, and STANLEY BIENENFELD, Individually,

Petitioners

v.

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent

HUBERT DAYE; TEDESCO BUS COMPANY, INC.; FRANK TEDESCO; and ACADEMY CHARTER SERVICE, INC., Each in His or Its Own Right and Also on Behalf of All Passengers of Bus 2065 of the Tedesco Bus Company, Inc., Injured on July 15, 1970, at New Smithville, Lehigh County, Pennsylvania, Their Parents, Guardians, Next of Kin, Heirs and Legal Representatives,

Petitioners

v.

THE COMMONWEALTH OF PENNSYLVANIA, THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, VICTOR W. ANCKAITIS, LESTER E. JORDAN, CHARLES C. SINCAVAGE, WILLIAM I. DAVIS, ROBERT BROWN and EDWIN REIKER,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT W. CUNLIFFE
Assistant Attorney General
ISRAEL PACKEL
Attorney General
Attorneys for Respondents

Commonwealth of Pennsylvania
Department of Transportation
Harrisburg, Pennsylvania 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

INDEX TO BRIEF

	PAGE
Opinion Below	1
Jurisdiction and Questions Presented	2
Constitutional Provisions Involved	3
Counter-Statement of the Case	4
Argument:	
No waiver of the 11th Amendment by the Commonwealth, express or implied, can be found in the acceptance of federal funds under any Federal Aid Highway Act	5
Conclusion	28

TABLE OF CITATIONS

CASES:

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F. 2d 1001 (4th Cir., 1968) 6, 19, 20, 21

Employees of the Department of Public Health and Welfare of Missouri et al. v. Department of Public Health and Welfare of Missouri, —— U.S. ——, 93 S. Ct. 1614, 36 L. Ed. 2nd 251 (1973) 24, 25, 26

Fay v. Noia, 372 U.S. 391, 9 L. Ed. 2d 847, 83 S. Ct. 822 (1963) 24

Ford Motor Co. v. Department of the Treasury of the State of Indiana, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945) ..22, 23, 24

Frankel v. Heym, 466 F. 2d 1226 (1972) .. 22

Hans v. Louisiana, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890) 18

Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 347 (1938) 24

Mahler v. United States, 306 F. 2d 713 (3rd Cir., 1962), cert. denied 371 U.S. 923, 9 L. Ed. 2d 231, 83 S. Ct. 390 .....9, 10, 14

Murray et al. v. Distilling Company et al., 213 U.S. 151, 53 L. Ed. 742, 29 S. Ct. 458 (1909) 24

Parden v. Terminal Railway of Alabama Docks Department, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964) 5, 17, 18, 19, 20, 21

Pennsylvania Environmental Council v. Bartlett, 454 F. 2d 613 (3rd Cir., 1971) 26

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959) 6, 15, 16, 17, 20

Pizitz v. Volpe, 4 E.R.C. 1197 (M.D. Ala., 1972) 27

Red Star Towing & Transportation Co. v. Department of Transportation of New Jersey, 423 F. 2d 104 (1970) 21, 22

D. R. Smalley & Sons, Inc. v. United States, 372 F. 2d 505 (Ct. Cl., 1967) 14

San Antonio Conservation Society v. Texas Highway Department, 446 F. 2d 1013 (5th Cir., 1971) 5, 26

MISCELLANEOUS:

Rivers and Harbors Act of 1899, 33 U.S.C. Sec. 401 20

Federal Aid Highway Act of 1916, June 11, P. L. 156, 39 Stat. 355 6

Highway Safety Act of 1966, 23 U.S.C. 401 et seq. 2, 6, 7, 8, 9, 14, 22, 27

National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4321 27

United States Constitution, Eleventh Amendment 2, 3, 5, 15, 18, 25, 27, 28

OPINION BELOW

The opinion delivered in the Court below is reported in 483 F. 2d 294 (sub nomine *Daye v. Commonwealth of Pennsylvania*). The opinion was delivered on August 3, 1973, and is appended to the Petition for a Writ of Certiorari.

JURISDICTION

The Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

1. Is not the Commonwealth of Pennsylvania immune from suit in an action instituted against it in the United States Courts by citizens of a foreign State, as guaranteed by the Eleventh Amendment to the Constitution of the United States?

2. Did Congress intend to create a private right of action by the Highway Safety Act of 1966 (23 U.S.C. 401 et seq.) against States accepting federal assistance in the design, construction and maintenance of public highways?

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provided:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State. . ."

COUNTER-STATEMENT OF THE CASE

On July 15, 1970, a bus proceeding on U.S. 22, Interstate 78, in Lehigh County, Pennsylvania, and in which petitioners were passengers, skidded off the road and overturned. As a result of that occurrence two actions were instituted wherein the Commonwealth of Pennsylvania was named as a defendant. One of the actions was instituted by Hubert Daye, the operator of the bus, and the owner of the bus, and the other by two minors who were passengers. Both complaints allege that the accident was caused by the negligence of the Commonwealth in the design, construction and maintenance of the highway in question.

The Report of the National Transportation Safety Board referred to in Petitioner's petition was not made a part of either Complaint as filed, nor referred to therein.

ARGUMENT

NO WAIVER OF THE 11TH AMENDMENT BY THE COMMONWEALTH, EXPRESS OR IMPLIED, CAN BE FOUND IN THE ACCEPTANCE OF FEDERAL FUNDS UNDER ANY FEDERAL AID HIGHWAY ACT

The Eleventh Amendment to the Constitution of the United States states:

> "The judicial power of the United States shall not be construed, or extend, to any suit in law or in equity commenced or prosecuted against one of the United States by citizens of a foreign state."

The protection provided by this Amendment has been construed to be waivable by the State under certain limited conditions. Thus, a State agency may be enjoined from violating a federal law, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F. 2d 1013 (5th Cir., 1971). Also, a state may waive its immunity by entering into an activity involving interstate commerce where Congress has conditioned such entry upon the allowance of a private right of action under limited circumstances, *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964). A State may also waive its immunity by forming an interstate

agency pursuant to a congressionally sanctioned compact specifically creating a right "to sue and be sued" in that agency, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959). Finally, a state may, arguably, waive its immunity by engaging in an activity of interstate commerce of a type allowable only by sufferance of Congress where a private right of action is permitted generally, *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 (4th Cir. 1968).

In the present case, petitioners argue that by accepting federal funds for the design and construction of the highway upon which the accident herein involved occurred, the Commonwealth waived its constitutional immunity and subjected itself to a private cause of action. The private cause of action is seen by petitioners as arising out of the Highway Safety Act of 1966, 23 U.S.C. 401 et seq., wherein Congress provided that states should design, construct and maintain federally-funded highways in a safe and secure manner.

In order for this Honorable Court to concur in this position, it would be necessary to ignore the entire highway-aid scheme established by Congress as early as 1916, Federal Aid Highway Act of 1916, June 11, P. L. 156, 39 Stat. 355, and followed ever since. There Congress specifically avoided any federal involvement in the State highway program beyond its funding. As to construction, the Act said:

> "The construction work and labor in each State shall be done in accordance with its laws,

and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant to this Act."

As to maintenace, the Act provided:

"To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance."

The most recent provision, found at 23 U.S.C. 116(c), enacted August 27, 1959, as P. L. 85-767, provides:

"If at any time the Secretary shall find that any project constructed under the provisions of this chapter, or constructed under the provisions of prior Acts, is not being properly maintained, he shall call such fact to the attention of the State highway department. If, within ninety

> days after receipt of such notice, such project has not been put in proper condition of maintenance, the Secretary shall withhold approval of further projects of all types in the entire State until such project shall have been put in proper condition of maintenance, unless such project is subject to an agreement pursuant to subsection (b) of this section, in which case approval shall be withheld only for secondary or urban projects in the county or municipality where such project is located."

Section 116 further provides in subsection (a):

> "It shall be the duty of the State highway department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system."

Clearly, maintenance is considered a state function, to be conducted by state officials, according to state law. The Congress merely provides for the establishment of minimum standards. Throughout, the Congress envisions its role as that of an investor. The sanction provided in every case for failure to comply with some congressional edict is the withdrawal of federal funds. The Congress requires nothing of the states, either at the construction and design stage or at the maintenance stage. The State has the option at any time to ignore the Federal Aid Highway Act and its progeny, the only result being the cessation

of Federal Aid. This is further seen by the fact that even the safety programs established under 23 U.S.C. 401 et seq., are *not* federal programs, but State programs:

> "Each state shall have a highway safety program approved by the Secretary . . ." 23 U.S.C. 402(a)

If a State fails to institute an adequate safety program, the Congress provides that the federal investment in the State's highway program should be reduced, 23 U.S.C. 402(c).

The key word to the scheme established by Title 23 is "participation". The federal government participates in the highway program; it does not sanction it, control it, or truly regulate it. Federal regulations, such as they are not *mandatory,* but rather the basis for federal participation. This distinction is of great importance in this case, since the federal highway aid scheme makes it clear that a state is not venturing into the "federal realm" by accepting federal funds. There are no "interstices" to fill, since the statutory scheme is complete. Crudely stated, the Congress has said to the states: we will participate in your highway program if you build highways according to federal guidelines we establish. If you do not, or if you cease doing so, we will withhold all or part of our investment.

This interpretation is consistent with *all* interpretations which have any bearing on this case. In *Mahler v. United States,* 306 F. 2d 713 (3rd Cir., 1962), cert. denied 371 U.S. 923, 9 L. Ed. 2d 231, 83 S. Ct.

390. Plaintiffs based their cause of action on the Federal Tort Claims Act (28 U.S.C. 1346) and upon federal defendant's alleged failure to properly inspect and supervise the construction and maintenance of a State highway built with the aid of federal funds. The accident was caused by a boulder lying in the road. Although the Court in *Mahler* did not specifically comment on the question of waiver of immunity under the 11th Amendment since only the federal government was involved, the Court did consider the scheme of the Federal Highway Program, saying:

> "Our inquiry therefore must be directed toward ascertaining the intent of Congress in enacting the pertinent legislation.
>
> Our conclusions are aided greatly by the relevant legislative history. We state preliminarily that when legislating in respect to roads Congress acts under the authority conferred upon it by Article I, Section 8, of the Constitution to regulate interstate commerce, to establish post roads, and to provide by expenditure of tax revenues for the National Defense and the General Welfare. But it is clear nonetheless that the construction, maintenance and the regulation of highways have remained state functions. South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 187, 58 S. Ct. 510, 514, 82 L. Ed. 734 (1938). In the cited case Mr. Justice Stone said: 'From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly

within its competence, even though interstate commerce is materially affected. Minnesota Rate Cases [Simpson v. Shepard], 230 U.S. 352, 416 [33 S. Ct. 729, 57 L. Ed. 1511]. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. Id. With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.' 303 U.S. at 187-188, 58 S. Ct. at 515. In note 5 cited to the text, Mr. Justice Stone cites a large number of cases in which the Supreme Court has upheld state regulations materially affecting interstate commerce. In Maurer v. Boardman, 336 Pa. 17, 7 A. 2d 466 (1939), aff'd sub nom. Maurer v. Hamilton, 309 U.S. 598, 60 S. Ct. 726, 84 L. Ed. 969 (1940), it was held that the highways in Pennsylvania are owned by the Commonwealth and that their preservation and the maintenance of safety on them are a concern of the state. It seems clear from the Acts of Congress and their accompanying legislative history, that grants-in-aid under the Federal Highway Program were and are designed to encourage states to construct their own highways and that the primary function of the Bureau of Public Roads, in approv-

ing plans submitted to it by a state and inspecting roads during and after construction, is that of making sure that federal appropriations are being utilized properly and efficiently by the respective states and are not being wasted.

Funds appropriated by Congress for the highway program are apportioned to the states according to a statutory formula, 23 U.S.C. §§21, 21a, 21a-2. The states then create general programs to employ these funds and prepare estimates for each project. 23 U.S.C. §12. Construction contracts are awarded by the states. The states pay the contractor and the respective states become and remain responsible for supervision of construction and for the maintenance of the highways after completion. 23 U.S.C. §§13, 15. The states are at all times the owners of the roads and are primarily responsible for their operation.

* * * * * *

The statutory scheme shows a weighing of the functions to be performed by the states and the Bureau of Public Roads, acting for the United States. The states are given what has been aptly described as 'operational control' of the projects. Congress gave the Bureau veto power insofar as the use of federal funds were concerned.

* * * * * *

The pertinent provisions of the Federal-Aid Road Act of 1916 were incorporated into the Federal Highway Act of 1921, 42 Stat. 212. The concern of the Congress in 1916 that fed-

eral funds be not dissipated but used effectively by the states is reiterated in a House report on S. 1072, the bill which became the Act of 1921, as follows: 'The purpose in presenting this bill to Congress is to provide amendments to the present law and to outline a definite plan for road construction, as well as to make such requirements as will conserve the public funds * * *.' H. Rep. No. 162, 67th Cong., 1st Sess., p. 4. The basic structure thus created by these statutes has been the foundation for all subsequent federal highway legislation. See S. Rep. No. 1965, 84th Cong., 2d Sess., p. 4 (1956); Report of the President's Advisory Committee on a National Highway Program, H. Doc. No. 93, 84th Cong., 1st Sess., p. 4 (1955); Levin, Federal Aspects of the Interstate Highway Program, 38 Neb. L. Rev. 377, 378 (1959); Note, 108 U. Pa. L. Rev. 534, 538-539 (1960). In light of the legislative history traced above, it is plain that the appellants cannot successfully rely on the federal highway acts unless they are able to show that legislation following the Act of 1921 has affixed to the inspection and approval sections the additional purpose of securing the safety of those using the federal-aid highways.

Although Congress early exhibited an awareness of the problem of highway safety and this awareness has continued to manifest itself in legislation dealing with the federal highway program, we have discovered nothing which would indicate that Congress has redesigned the inspections during and after construction to func-

> tion as anything more than that which was originally intended, viz., a means of protecting the federal investment. Without such an expansion of purpose, the inspection provisions of the statute do not create a duty running to these plaintiffs." 306 F. 2d at 716-717, 721-722.

See also, *D. R. Smalley & Sons, Inc. v. United States,* 372 F. 2d 505 , 507 (Ct. Cl., 1967), where the court followed *Mahler* and refused to grant relief to a contractor who sought to impose liability on the federal government because of harm caused by the federal regulations on which grants to the State of Ohio was based.

Petitioners argue that the 1966 Act, which added Chapter IV to Title 23 U.S.C., supersedes the *Mahler* decision. As has been shown, however, Chapter IV does nothing to change the basic framework of the scheme established by Congress in 1916. The only federal sanction is the withdrawal of funding. The finding of a waiver by this court, in addition to the foregoing difficulties would have ludicrous or unwarranted consequences. Narrowly read, a plaintiff's right of action would depend not on the condition of the highway, but on the nature of the funding entity and whether on any given day the highway was within or without the federal aid system. If this waiver were not so limited, any case involving highway design or maintenance of any kind on any highway would be subject to federal scrutiny. In Pennsylvania, furthermore, the State Courts would be precluded from hearing these cases. Such a curious dichotomy was clearly not contemplated, and definitely not desired by Congress.

It is not too much to say that this Court is not being asked to find a *waiver,* but is being asked to circumvent the Eleventh Amendment entirely insofar as highway matters are concerned. This is clearly not consonant with the Congressional Act, for it would mean that this Court must find that Congress pre-empted the State's right to design, maintain and construct highways—clearly at odds with Title 23.

The extreme caution expressed in the opinions cited at the beginning of this section demonstrate the hesitancy of this Court to substantially limit the effect of the Eleventh Amendment. In *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, supra, Mr. Justice Douglas confronted this question at the outset of his majority opinion, stating:

> "When the Court in 1793 held that a State could be sued in the federal courts by a citizen of another State (Chisholm v Georgia (US) 2 Dall 419, 1 L ed 440), the Eleventh Amendment was passed precluding it. But this is an immunity which a State may waive at its pleasure (Missouri v Fiske, 290 US 18, 24, 78 L ed 145, 148, 54 S Ct 18) as by a general appearance in litigation in a federal court (Clark v. Barnard, 108 US 436, 447, 448, 27 L ed 780, 784, 785, 2 S Ct 878) or by statute. Ford Motor Co. v Department of Treasury, 323 US 459, 468-470, 89 L ed 389, 396, 397, 65 S Ct 347. The conclusion that there has been a waiver of immunity will not be lightly inferred. Murray v Wilson Distilling Co., 213 US 151, 171, 53 L ed 742, 751, 29 S Ct 458. Nor will a waiver of immu-

> nity from suit in state courts do service for a waiver of immunity where the litigation is brought in the federal court. Chandler v. Dix, 194 US 590, 591, 592, 48 L ed 1129, 1130, 1131, 24 S Ct 766. And where a public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal, courts. Cf. Delaware River Joint Toll Bridge Com. v. Colburn, 310 US 419, 84 L ed 1287, 60 S Ct 1039. Suits against agencies of a State based on maritime tolls are no exception to these rules. Re New York, 256 US 490, 65 L ed 1057, 41 S Ct 588."

The opinion went on to emphasize that the reason Petty was allowed to maintain an action was because the compact between Missouri and Tennessee as approved by Congress pursuant to the Compact Clause, Art. I, Section 10, cl. 3. This compact specifically stated:

> "That nothing herein contained shall be construed *to affect, impair, or diminish any right, power, or jurisdiction* of the United States or *of any court*, department, board, bureau, officer, or official *of the United States, over or in regard to any navigable waters, or any commerce between the States* or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agree-

> ment or otherwise affected by the terms thereof." (Italics added by the Supreme Court.) 359 U.S. at 277-278.

Your Honorable Court went on to note that this compact has been accepted by both Tennessee and Missouri. However, since the compact was approved by the Congress specifically, its interpretation was held to be a federal question (359 U.S. at 278), and that:

> "[The Congress] approved a sue-and-be-sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have." 359 U.S. at 280

Rather than indicate a tendency toward limiting the scope of the Eleventh Amendment, *Petty*, supra, reflects a concern on the part of Your Honorable Court to avoid great expansions of federal jurisdiction in this field.

The caution found in the foregoing case was again exhibited in *Parden et al. vs. Terminal Railway of the Alabama State Docks Dept. et al.*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207, rehearing denied 377 U.S. 1010, 12 L. Ed. 1057, 84 S. Ct. 1903 (1964). The *Parden* case centers around a railroad operated for commercial purposes by the Alabama State Docks Department. The Congress had passed the Federal Employers' Liability Act, which established that "every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier com-

mence," and that "under this chapter an action may be brought in a district court of the United States. . ." 45 U.S.C. Section 51, Section 56. This action did not specifically raise the 11th Amendment, since the Plaintiffs were Alabama residents, but the same doctrine applied through *Hans v. Louisiana,* 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890). In *Parden,* both the District Court and the Court of Appeals found that Alabama was immune. Your Honorable Court reversed, saying:

> "Where a States' consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. Here as in Petty, the States by venturing into the congressional realm 'assume the conditions that Congress under the Constitution attached.' 359 U.S. at 281-282
>
> Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation it, subjects itself to that regulation as fully as if it were a private person or corporation." 377 U.S. at 196.

In reaching this conclusion, however, Your Honorable Court stated that:

> "To read a 'sovereign immunity exception' into the Act would result, moreover, in a right without a remedy; it would mean that Congress made 'every' interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state-owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result.
>
> We therefore read the FELA as authorizing suit in a Federal District Court against state-owned as well as privately-owned common carriers by railroad in interstate commerce." 377 U.S. 190

In other words, Your Honorable Court placed great emphasis on the fact that in *Parden*, Congress had created a specific and clear mechanism for the recovery of damages. No such specific mechanism exists under the Highway Aid Act, where, in fact, quite a different, but equally specific mechanism is provided the withholding of federal funds. The Court also was impressed by the commercial nature of Alabama activities. It cannot be argued that highways under the jurisdiction of the Pennsylvania Department of Transportation have any commercial purpose.

The degree of caution expressed in the foregoing decisions is also reflected in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 (4th Cir., 1968). *Lauritzen* concerned an accident caused

by an allegedly submerged base of a collapsed light tower. The libellant's ship collided with the base. The light tower was owned and operated by the District. After finding the District to be an agency of the state government, the Fourth Circuit went on to consider the status of the District's immunity under the Eleventh Amendment stating:

> "Necessarily, the State recognized that she built in the Bay only by sufferance of the Federal government. This acknowledgment is conclusively evidenced by her petition for permission pursuant to the act of Congress, 33 U.S.C.M. §401 et seq., to occupy navigable waters with bridges and tunnels. The supplication of the State, and her reception into the Federal domain, meant surrender, pro tanto and pro tempore, of State sovereignty and submission to the paramount overlordship of the United States during the tenancy.
>
> Congressional regulation allows causes involving activities in and upon the navigable waterways of the Nation to be adjudicated in the admiralty. 28 U.S.C. §1333. Accordingly, we think liability of the Tunnel District to the Danish suitor upon the maritime tort was justiciable in the chosen instant court." 404 F. 2d at 1003-1004

It should be noted that this finding is arguably consistent with the *Petty* and *Parden* cases, supra. The court found a realm where the Congress had and exercised exclusive control in addition to a specific statute allowing a private right of action.

In *Red Star Towing & Transportation Co. vs. Department of Transportation of New Jersey*, 423 F. 2d 104 (1970), Plaintiffs alleged that a barge operated by them was caused to collide with the fender system of a state-owned bridge due to the state's negligent maintenance of the system and negligent delay in opening the bridge. Plaintiff argued that New Jersey had waived its immunity by building in navigable waters. The Court distinguished the *Parden* case, supra, and commented on *Lauritzen*, supra, stating:

> "In the Parden case the Supreme Court made clear that the mere entry of a State into a field of congressional regulation will not subject it to suit by private individuals. 377 U.S. at 186, 84 S. Ct. 1207. Congress must express an intent to override the State's immunity. In Parden the Supreme Court found such an intent in the creation by Congress of such a cause of action against private persons as was asserted against the State. However, as has been pointed out, the presently relevant statute regulating the bridging of navigable streams does not confer any new civil remedy upon private parties and thus cannot by logical inference be read as intended to impose equivalent civil liability on an otherwise immune State. A contrary result in Chesapeake Bay Bridge and Tunnel District v. Lauritzen, E.D. Va. 1966, 259 F. Supp. 633, aff'd, 4th Cir. 1968, 404 F. 2d 1001, seems to be based upon the court's conclusion that the Rivers and Harbors Appropriation Act of 1899 was designed to protect private persons. But that, in our view, is not enough. Where Congress,

> in providing protection against private violators created no new remedy other than penal sanctions, we think it is illogical to imply that Congress intended that a violation by the State should give rise to a civil claim for damages. Moreover, since the State must consent to suit it seems arbitrary to say that the State consents to civil liability that could not be anticipated by reading the relevant federal statute." 423 F. 2d at 106.

It is the position of the Commonwealth that in *Red Star* Plaintiffs had a stronger case than Petitioners do here. Navigable waters are, historically, very much in the Federal domain. Roads, on the other hand, are more closely allied to the states domain. The Federal Highway Act repeatedly emphasizes the nature of Federal involvement. No hint of possible tort liability exists in any provision of Title 23 U.S.C., especially not in Chapter IV of that title. "The relaxation of sovereign immunity is peculiarly a matter of legislative concern, responsibility and policy. If novel types of awards are to be permitted against the government, Congress should affirmatively authorize them," *Frankel v. Heym,* 466 F. 2d 1226, 1229 (1972).

In *Ford Motor Company v. Department of the Treasury of the State of Indiana,* 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), individual members of the Treasury Board as well as the Department were sued under a statute authorizing the maintenance of such suits. The state argued that the statute involved only authorized state courts to hear such cases. This point was raised for the first time in the

United States Supreme Court on appeal by the state. In ordering the dismissal of the action for want of jurisdiction the Court said:

> "While the state's immunity from suit may be waived, Clark v. Barnard, 108 US 436, 447, 27 L ed 780, 784, 2 S Ct 878; Gunter v. Atlantic Coast Line R. Co. 200 US 273, 50 L ed 477, 26 S Ct 252; Missouri v. Fiske, 290 US 18, 24, 78 L ed 145, 148, 54 S Ct 18, there is nothing to indicate authorization of such waiver by Indiana in the present proceeding.
>
> Section 64-2614(a) authorizes 'action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected.' In the Read Case we construed a similar provision of an Oklahoma tax refund statute as a waiver of state immunity from suit in state courts only. 322 US 47, 54, 88 L ed 1121, 1126, 64 S Ct 873. As was said in that case: 'When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to be astute to read the consent to embrace federal as well as state courts . . . when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be

found.' Cf. United States v. Shaw, 309 US 495, 501, 84 L ed 888, 892, 60 S Ct 659. Section 64-2614 does not contain any clear indication that the state intended to consent to suit in federal courts. The provision in this section which vests original jurisdiction of suits for refund in the 'circuit or superior court of the county in which the taxpayer resides or is located' indicates that the state legislature contemplated suit in the state courts. Moreover, this interpretation of §64-2614(a) to authorize suits only in state courts accords with the state legislative policy. Indiana has adopted a liberal policy toward general contract claimants but confines their suits against the state to state courts." 323 U.S. at 465-6166

Also, see *Murray et al. v. Distilling Company et al.*, 213 U.S. 151, 53 L. Ed. 742, 29 S. Ct. 458 (1909), where the court again emphasized the need for a highly specific waiver (213 U.S. at 170-171). Courts must indulge every reasonable presumption against waiver of fundamental constitutional rights, and may not presume acquiescence in the loss of fundamental rights, *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 A.L.R. 347 (1938); *Fay v. Noia*, 372 U.S. 391, 9 L. Ed. 2d 847, 83 S. Ct. 822 (1963).

In *Employees of the Department of Public Health and Welfare of Missouri et al. v. Department of Public Health and Welfare of Missouri*, —— U.S. ——, 93 S. Ct. 1614, 36 L. Ed. 2nd 251 (1973), the action was by employees of the State health facilities for

overtime pay due them under the Fair Labor Standards Act. Section 16(b) of the Act made employers liable for the amount of unpaid minimum wages in an action "in any court of competent jurisdiction". The District Court dismissed the action as being bound by the provisions of the Eleventh Amendment and the Circuit Court of Appeals affirmed. On certiorari Your Honorable Court affirmed, saying:

> "The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State. Parden involved the railroad business which Alabama operated 'for profit.' 377 US, at 185, 12 L Ed 2d 233. Parden was in the area where private persons and corporations normally ran the enterprise.
>
> "State mental hospitals, state cancer hospitals, and training schools for delinquent girls which are not operated for profit, are not proprietary . . ."
>
> . . .
>
> "[7] But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts. The Parden opinion did state that it would be 'surprising' to learn that Congress made state railroads liable to employees under FELA yet provided 'no means by which that liability may be enforced.' 377 US, at 197, 12 L Ed 2d 233. It would also be sur-

prising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old §16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum." 36 L. Ed. 2nd 256, 257.

The line of cases starting with *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F. 2d 1013 (5th Cir., 1971), often categorized as environmental cases has no application here. As this court noted in *Pennsylvania Environmental Council v. Bartlett*, 454 F. 2d 613 (3rd Cir., 1971), the applicability of Eleventh Amendment immunity to such cases is at least very doubtful. However, plaintiffs in neither of the foregoing cases sought financial damages, but rather sought equitable relief. Typically, Plaintiffs allege the violation of a federal law or regulation and seek to enjoin the state or federal government from further action until that law is complied with. The key question in every case is whether or not the conditions upon which the federal grant is based have been complied with. The Plaintiffs do not seek to punish an allegedly violating agency or official, but

seek a court order which defines the conditions for further federal financing under federal law. This is obviously a federal question, as it revolves strictly around the expenditure of federal funds. Furthermore, the National Environmental Policy Act of 1969, 42 U.S.C. Sect. 4321, upon which many of the environmental suits are passed, provides only procedural remedies, as opposed to substantive rights. Thus, a group of businessmen were not entitled to an injunction on the basis of threatened loss of profits, *Pizitz vs. Volpe*, 4 E.R.C. 1197 (M.D. Ala., 1972). Clearly, related provisions in Title 23, such public hearing under Sect. 123, also provide only procedural remedies—and courts may direct relief toward this goal.

A State's rights under the Eleventh Amendment are just as fundamental, in constitutional terms, as the citizen's right to jury trial, to protection from illegal search and seizure, and to freedom of speech. The question which this Court is being asked to decide is far more fundamental than whether several individuals involved in extremely unfortunate accidents may recover for their alleged losses. The law is clear that if such a right of recovery does not exist, it must be legislatively created. The question before this court, however, goes to the nature of our federal system of government. The State is clearly immune from suit under the Eleventh Amendment. Furthermore, there is no language, expressed or implied, which would suggest the creation of a federal right of action as a condition precedent to receiving a federal highway grant. To hold that a cause of action exists because of an expression of Congres-

sional interest, or because of the creation of a federal assistance program, would end the significance of the Eleventh Amendment to the United States Constitution.

The District Court, in its well-reasoned opinion, recognized the very clear constitutional limits imposed on the federal judiciary system in this case, and the Commonwealth respectfully asks that that decision be affirmed.

CONCLUSION

The Respondent, Commonwealth of Pennsylvania, acting through its Department of Transportation, respectfully requests Your Honorable Court to deny the Petition for Writ of Certiorari to the Circuit Court of Appeals (3rd Circuit).

Respectfully submitted,
ROBERT W. CUNLIFFE
Deputy Attorney General
ISRAEL PACKEL
Attorney General
Attorneys for Respondent